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CPLR 202: Cause of Action for Personal Injuries by Plaintiff Not in Privity with Manufacturer Accrues, for Purposes of Borrowing Statute, in Jurisdiction Where Injury Occurred

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beyond substantial question. In *People v. Coleman,* the Court determined that a right to counsel attaches after the issuance of a court order of removal directing defendant's appearance at a prearraignment lineup; however, this right may be waived in the absence of an attorney if one has not been retained or appointed. It is hoped that *The Survey's* discussion of these and other developments will serve to aid the practitioner in keeping abreast of the major developments in New York practice.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 202: Cause of action for personal injuries by plaintiff not in privity with manufacturer accrues, for purposes of borrowing statute, in jurisdiction where injury occurred

Under CPLR 202 New York courts are required to apply a foreign jurisdiction's statute of limitations to causes of action which accrue in that jurisdiction, if to do so would render the suit of a nonresident plaintiff time barred.[1] Until recently there has been a conflict of opinion on the proper application of this statute to actions brought to recover for personal injuries caused by defective products.[2] In such actions, the plaintiff has had a choice of using

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[1] CPLR 202 (McKinney 1972) provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

CPLR 202 represents an attempt to prevent "forum shopping" by non-resident plaintiffs seeking to benefit from New York's generous statutes of limitations. *See* Martin v. Julius Dierck Equip. Co., 52 App. Div. 2d 463, 468, 384 N.Y.S.2d 479, 483 (2d Dep't 1976), *aff'd,* 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978); Daigle v. Leavitt, 54 Misc. 2d 651, 283 N.Y.S.2d 328 (Sup. Ct. Rockland County 1967); [1943] N.Y. LAW REV. COMM'N REP. 146; 1 WK&M ¶ 202.01. Essential to the application of CPLR 202 is the determination of where the cause of action accrued. Traditionally, a cause of action was deemed to accrue in the place of the wrong, *lex loci delicti. See* R. LEFLAR, AMERICAN CONFLICTS LAW § 132 (1968). In order to avoid the harsh results often produced by this rigid test, many jurisdictions, including New York, adopted a "grouping of contacts" or "significant governmental interests" approach under which a cause of action is deemed to "accrue" in the jurisdiction most closely related to the events in litigation. *See, e.g.,* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, Comment f (1971); Ester, *Borrowing Statutes of Limitations and Conflict of Laws,* 15 U. FLA. L. REV. 33 (1962); Gegan, *Where Does a Personal Injury Action Accrue Under the New York Borrowing Statute,* 47 ST. JOHN'S L. REV. 62 (1972) [hereinafter cited as Gegan]; Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitations,* 27 HASTINGS L.J. 1 (1975); Comment, *Choice of Law and the New York Borrowing Statute: A Conflict of Rationales,* 35 ALB. L. REV. 754 (1971).

[2] *Compare* Martin v. Julius Dierck Equip. Co., 52 App. Div. 2d 463, 384 N.Y.S.2d 479 (2d Dep't 1976), *aff'd,* 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978), *with* Myers v. Dunlop Tire & Rubber Corp., 40 App. Div. 2d 599, 335 N.Y.S.2d 961 (1st Dep't 1972).

either a tort theory or a warranty theory.[3] A particular problem arises when the nonresident plaintiff's suit sounds in breach of warranty, since, for purposes of applying CPLR 202, the cause of action may be deemed to have accrued in either the jurisdiction in which the sale occurred or the jurisdiction in which the plaintiff was injured.[4] This problem was addressed in *Martin v. Julius Dierck Equipment Co.*,[5] wherein the Court of Appeals held that, regardless of the theory used, a cause of action for personal injuries resulting from a defectively manufactured product accrues in the jurisdiction in which the injury occurred.[6] In dictum, the Court went on to state

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Jurisdictions other than New York have also had difficulty in determining where and when a cause of action accrues where personal injuries are the result of a defectively manufactured product. A majority of jurisdictions have held that such suits, even if they are labeled breach of warranty, sound in tort and therefore are deemed to accrue at the time and place of injury. *See, e.g.*, Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890 (N.D. Ill. 1971); Tyler v. R.R. Street & Co., 322 F. Supp. 541 (E.D. Va. 1971); Public Adm'r v. Curtiss-Wright Corp., 224 F. Supp. 236 (S.D.N.Y. 1963); Creviston v. General Motors Corp. Fla., 225 So. 2d 331 (Fla. 1969); Cartwright v. Chrysler Corp. La., 232 So. 2d 285 (La. 1970); Parish v. B.F. Goodrich Co., 395 Mich. 271, 235 N.W.2d 570 (1975); Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973). In a few jurisdictions, however, courts have held that a breach of warranty cause of action, based on personal injuries, accrues upon tender of delivery. *See, e.g.*, Peeke v. Pennsylvania Cent. Transp. Co., 403 F. Supp. 70 (E.D. Pa. 1975); Hodge v. Service Mach. Co., 314 F. Supp. 707 (E.D. Tenn. 1970); Rufo v. Bastian Blessing Co., 417 Pa. 107, 207 A.2d 823 (1965). One commentator has noted that for reasons of policy, the determination of the situs of accrual for purposes of CPLR 202 should be handled differently than a determination of accrual for an action under ordinary New York statutes of limitations. This author reasoned:

> While the Court of Appeals has yet to pass on the question, all indications are that when a product is manufactured in one state and sold to a user in another state where it causes injury the action in strict products liability is governed by the law of the buyer's state, the state whose "general security" has been disrupted and which has the responsibility for compensating the victim and satisfying his creditors.

Gegan, *supra* note 1, at 65-66 (footnote omitted).

[3] *See* Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). In *Victorson*, the Court of Appeals stated that, depending on the facts in each case, a party who is injured by a defectively manufactured product may maintain an action against the seller under three theories: breach of express or implied warranty, strict products liability, and common-law negligence. Privity of contract with the seller was unnecessary, regardless of the theory chosen. *See generally* Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

The availability of alternative theories has provided injured persons with the opportunity to select the most beneficial statute of limitations. The applicable period for bringing an action in strict products liability or negligence is 3 years from the date the injury occurs. CPLR 214 (McKinney Supp. 1977-1978). An action for breach of warranty, however, must be brought within 4 years of tender of delivery. UCC § 2-725 (McKinney 1964).

[4] *See* notes 1 & 3 *supra*.

[5] 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978), *aff'g* 52 App. Div. 2d 463, 384 N.Y.S.2d 479 (2d Dep't 1976).

[6] 43 N.Y.2d at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189.

that the breach of warranty remedy is no longer available at common law to an injured plaintiff who is not in privity with the seller of a defective product.[7]

Plaintiff Martin, a resident of the District of Columbia, was injured in Virginia on June 7, 1968, as a result of the malfunctioning of a forklift truck owned by his employer.[8] The truck had been manufactured and delivered in New York, the principal place of business of both the manufacturer and the distributor.[9] Alleging causes of action in negligence and breach of warranty, the plaintiff instituted suit in New York on May 21, 1971, against the distributor, and on June 21, 1971, against the manufacturer.[10] Defendants moved for summary judgment, arguing that, since the plaintiff had been injured in Virginia, CPLR 202 required that that state's 2-year statute of limitations for personal injury[11] be applied to bar both causes of action.[12] The Supreme Court, Queens County, held that the negligence claim accrued in Virginia on May 29, 1969, plaintiff's twenty-first birthday,[13] and was therefore time barred under the Virginia statute.[14] The breach of warranty claim, however, was held to have accrued in New York, where the truck was delivered, and was thus timely under the 4-year New York limitations period.[15] On

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[7] *Id.* at 589-90, 374 N.E.2d at 100, 403 N.Y.S.2d at 188.

[8] *Id.* at 587, 374 N.E.2d at 98, 403 N.Y.S.2d at 186.

[9] *Id.*

[10] *Id.*

[11] VA. CODE § 8.01-246 (1977) allows 3 years within which to bring an action based upon "any unwritten contract, express or implied," but contains an additional limitation:

> Provided that as to any action to which § 8.2-725 of the Uniform Commercial Code [(warranties)] is applicable, that section shall be controlling except that in products liability actions for injury to person . . . the [2-year] limitation prescribed in § 8.01-243 shall apply.

See note 14 *supra*. *See* Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969); Friedman v. Peoples Serv. Drug Stores, 208 Va. 700, 160 S.E.2d 563 (1968). The *Martin* plaintiff's action, therefore, would have been time barred if Virginia law were deemed applicable.

[12] 43 N.Y.2d at 587, 374 N.E.2d at 98, 403 N.Y.S.2d at 186.

[13] Since the plaintiff was a minor at the time of his injury, the running of the statute of limitations was tolled until he attained majority. *Id.; see* CPLR 208 (McKinney Supp. 1977-1978); VA. CODE § 8.01-229 (1977).

[14] 43 N.Y.2d at 587, 374 N.E.2d at 98, 403 N.Y.S.2d at 186. Since the negligence action in *Martin* accrued in Virginia, CPLR 202 required the application of that state's 2-year statute of limitations, which provides:

> Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, . . . shall be brought within two years next after the cause of action shall have accrued.

VA. CODE § 8.01-243 (1977); *see* note 11 *supra*.

[15] 43 N.Y.2d at 587, 374 N.E.2d at 98, 403 N.Y.S.2d at 187. The Court relied on the rationale in Myers v. Dunlop Tire & Rubber Corp., 40 App. Div. 2d 599, 335 N.Y.S.2d 961 (1st Dep't), *modifying per curiam* 69 Misc. 2d 729, 330 N.Y.S.2d 461 (Sup. Ct. N.Y. County 1972). The *Myers* plaintiff, a Kentucky resident, was injured in Kentucky by a defective tire

appeal, the Appellate Division, Second Department, reversed, holding that the breach of warranty claim was tortious in nature and therefore accrued in Virginia, the situs of the injury.[16] Utilizing CPLR 202, the court applied the Virginia statute of limitations[17] and dismissed the second cause of action.[18]

Affirming the appellate division's decision, the Court of Appeals stated that the cause of action which the plaintiff had labeled breach of warranty was actually one sounding in strict products liability.[19] Writing for the majority,[20] Judge Jasen reasoned that an action against a remote seller for personal injuries resulting from a defective product is fundamentally different from one which seeks to restore to the plaintiff the benefit of his bargain.[21] Thus, in Judge Jasen's view, the fact that a plaintiff not in privity attaches a breach of warranty label to his claim should not affect the determination of where and when his cause of action accrued.[22]

In reaching this conclusion, however, the *Martin* Court stressed that it was not rebuilding the "citadel of privity," which had been discredited in a series of earlier decisions.[23] Instead, Judge Jasen stated, the Court was merely eliminating a theory of recovery which

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manufactured in and delivered F.O.B. New York. The first department held that the negligence claim accrued upon injury in Kentucky, but that the warranty claim accrued in New York at the time of the sale. 40 App. Div. 2d at 599, 335 N.Y.S.2d at 961-62.

[16] 52 App. Div. 2d at 467, 384 N.Y.S.2d at 483. The appellate division reasoned that "the 'life' of the fork lift truck in [New York] was limited to a dormant and transitory interval between its manufacture and shipment to . . . Virginia." *Id.* at 467, 384 N.Y.S.2d at 482. Noting that the injury upon which all claims were predicated occurred in Virginia, the court determined Virginia to be the state with the most significant interest in the litigation. *Id.*; *see* note 2 *supra*.

[17] *See* notes 11 & 14 *supra*.

[18] 52 App. Div. 2d at 468, 384 N.Y.S.2d at 483.

[19] 43 N.Y.2d at 589, 374 N.E.2d at 99, 403 N.Y.S.2d at 187.

[20] Joining Judge Jasen in the majority opinion were Chief Judge Breitel, and Judges Jones and Wachtler. Judge Gabrielli dissented in part and filed a separate opinion in which Judges Cooke and Fuchsberg concurred.

[21] 43 N.Y.2d at 589, 374 N.E.2d at 100, 403 N.Y.S.2d at 188; *see, e.g.*, Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 402, 335 N.E.2d 275, 278, 373 N.Y.S.2d 39, 43 (1975); RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965). *See generally* W. PROSSER, THE LAW OF TORTS § 92 (4th ed. 1971); Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974). The *Martin* majority stressed the distinction between a contract remedy, which attempts to place the parties in the "position they would have been in if the agreement had been performed," and a tort remedy, which is designed to place the injured party "in the position he occupied prior to his injury." 43 N.Y.2d at 589, 374 N.E.2d at 100, 403 N.Y.S.2d at 188. This distinction, however, would appear to have little significance in a defective products action, since express statutory provision has been made for the recovery of "consequential" damages for personal injuries resulting from a breach of warranty. UCC § 2-715 (McKinney 1964).

[22] 43 N.Y.2d at 589-90, 374 N.E.2d at 100, 403 N.Y.S.2d at 188.

[23] *Id.* at 590, 374 N.E.2d at 100, 403 N.Y.S.2d at 188; *see, e.g.*, Codling v. Paglia, 32

had been rendered obsolete by the "evolution of an alternative remedy in strict products liability."[24] In the *Martin* Court's view, the availability of this remedy had made "unnecessary the distortions previously required to permit injured plaintiffs to recover from those who put defective products into the stream of commerce."[25] The amendment of UCC § 2-318 in 1975, extending to parties not in privity the right to sue the seller for breach of warranty,[26] was not deemed controlling since the cause of action in *Martin* accrued prior to that date.[27] The *Martin* majority nevertheless indicated that it might reach a similar conclusion in a case arising under the new statute.[28]

In contrast, the *Martin* dissent would have preferred to follow the "principles inherent in the statute" and allow the plaintiff to proceed under a breach of warranty theory.[29] Writing for the dissent, Judge Gabrielli asserted that the plain language of the amended statute demonstrates the legislature's intention to provide a breach of warranty remedy separate and distinct from any common-law right of action in strict products liability.[30] Since the plaintiff's suit sounded in breach of warranty rather than tort, Judge Gabrielli would have invoked UCC § 2-725, which provides that such causes

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N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

[24] 43 N.Y.2d at 590, 374 N.E.2d at 100, 403 N.Y.S.2d at 189.

[25] *Id.*, 374 N.E.2d at 100, 403 N.Y.S.2d at 188; *see* note 35 *infra*.

[26] Ch. 774, § 1, [1975] N.Y. Laws 1208 (McKinney). The former statute limited the parties who could bring a breach of warranty action to

> any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

Although this provision represented a modification of the strict privity rule, it failed to provide an adequate remedy for all those who might be injured by defectively manufactured products. The need for a broader remedy was met by the evolution of a common-law cause of action in strict products liability. *See* note 33 *infra*. Ultimately, the legislature eliminated the privity requirement entirely by enacting the present version of UCC § 2-318 (McKinney Supp. 1977-1978), which provides:

> A seller's warranty whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

[27] 43 N.Y.2d at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189.

[28] *Id.* Acknowledging the position taken by the dissent, *see* text accompanying note 29 *infra*, Judge Jasen "view[ed] unnecessary further discussion of . . . section 2-318," but "note[d] the likelihood of disagreement as to its effect should a case arise in which its applicability may properly be considered." 43 N.Y.2d at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189.

[29] 43 N.Y.2d at 595, 374 N.E.2d at 104, 403 N.Y.S.2d at 192 (Gabrielli, J., dissenting).

[30] *Id.* at 595, 374 N.E.2d at 103, 403 N.Y.S.2d at 191-92 (Gabrielli, J., dissenting).

of action accrue upon tender of delivery.[31] Thus, in the dissent's view, CPLR 202 required application of the longer New York limitations period and a finding that plaintiff's breach of warranty action was timely.[32]

Viewed narrowly, the *Martin* decision may be interpreted as holding that, in the absence of privity, actions for personal injuries resulting from defective products will be analyzed by the Court in accordance with tort principles, regardless of the label the plaintiff affixes to his suit. Thus, suits brought for breach of warranty, to which the amended provisions of UCC § 2-318 are applicable, will be treated as tort actions for purposes of applying CPLR 202 and other procedural rules. Such an interpretation would render *Martin* consistent with a line of cases in New York which have rejected the mechanical use of contract principles where the act giving rise to the cause of action is tortious in nature.[33]

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[31] UCC § 2-725 (McKinney 1964). Although section 2-725 refers only to the *time* the cause of action accrues, Judge Gabreilli stated that "it would appear to follow logically that such an action would also accrue at the place of tender of delivery." 43 N.Y.2d at 596, 374 N.E.2d at 104, 403 N.Y.S.2d at 192 (Gabrielli, J., dissenting).

[32] *Id.* at 596-97, 374 N.E.2d at 104, 403 N.Y.S.2d at 193 (Gabrielli, J., dissenting). The *Martin* dissent rejected the majority's view that a plaintiff not in privity could not maintain a breach of warranty action. Noting that the *Martin* majority had revived "the once toppled walls of the citadel of privity," Judge Gabrielli stated that the plaintiff's breach of warranty action should have been recognized. *Id.* at 593-94, 374 N.E.2d at 102, 403 N.Y.S.2d at 190-91 (Gabrielli, J., dissenting).

[33] An historical evaluation of the New York cases suggests that the *Martin* holding may be the logical culmination of two decades of legal development. In Goldberg v. Kollsman Instrument Co., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), the Court stated that "breach of law-implied warranties" was a tortious wrong and dispensed with the requirement of privity. *Id.* at 436-37, 191 N.E.2d at 82-83, 240 N.Y.S.2d at 594-95. The *Goldberg* Court indicated that strict tort liability was "surely a more accurate phrase" to describe plaintiff's cause of action. *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595. Six years later, in Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), the Court indicated that "strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action." *Id.* at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494. The *Mendel* Court chose to recognize and apply only the contract statute of limitations, stating that "it would be absurd to have two different periods of limitation applicable to the same cause of action, with the same elements of proof, complaining of the very same wrong." *Id.*, 253 N.E.2d at 210, 305 N.Y.S.2d at 494-95. In a 1973 action brought for negligence and breach of warranty, Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), the Court stated that breach of an implied warranty resulting in personal injury is a "tortious wrong," which may form the basis of an action in strict products liability, even in the absence of privity. *Id.* at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469.

In Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), the Court of Appeals formally recognized a separate cause of action in strict products liability. In extending the remedy to non-buyers and non-users of a defective product, the *Victorson* Court suggested that, in the past, the courts merely had used contract rather than tort language to describe what was essentially tortious liability. *Id.* at 401-02, 335 N.E.2d at 277-78, 873 N.Y.S.2d at 42-43; *see* 2 L. FRUMMER & M. FRIEDMAN, PRODUCTS

In a broader context, the *Martin* decision may be interpreted as a suggestion by the Court that the legislature reconsider the viability of the statutory breach of warranty remedy in light of the availability of a fully developed common-law action in strict products liability. It has been observed that "the warranty rationale of strict liability for injury caused by defectively, though non-negligently, manufactured products was merely temporary scaffolding, useful in constructing the new tort, but to be dismantled once the structure was complete."[34] Now that New York has expressly approved the strict products liability remedy, there would appear to be no need to retain an additional remedy within a statutory scheme that was designed to govern commercial relationships.[35]

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ARTICLE 32—ACCELERATED JUDGMENT

CPLR 3211: Court of Appeals modifies showing necessary to gain dismissal for failure to state a cause of action

Upon the hearing of a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action,[36] section 3211(c) permits either

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LIABILITY § 16A[5][g] (1975), wherein the authors suggest that the *Goldberg* Court's use of warranty language rather than tort concepts had an influence on the *Mendel* Court's decision.

Finally, in Micallef v. Miehle, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976), the Court reaffirmed its position by stating that a cause of action for breach of implied warranty "based on tortious behavior, is more correctly treated under the theory of strict products liability." *Id.* at 387, 348 N.E.2d at 578-79, 384 N.Y.S.2d at 122 (citation omitted).

[34] Gegan, *supra* note 1, at 64.

[35] While the breach of warranty remedy and the tort remedy appeared superficially compatible, their underlying theoretical inconsistencies led to anomalous and sometimes illogical results. *See* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), *overruled in* Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

[36] CPLR 3211(a)(7) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action . . . ." A motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) ordinarily is made before the answer is filed. CPLR 3211, commentary at 33 (McKinney 1970). The motion may be used simply to test the legal sufficiency of the pleading. Alternatively, the movant may use extrinsic material to attack the factual bases of the complaint. *Id.* at 30. The use of evidentiary matter in support of the motion, however, was drastically limited in Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976) (per curiam); *see* note 39 *infra*.

In opposition to the motion the plaintiff should request leave to replead in the event of dismissal. *See* CPLR 3211(e). In addition, the plaintiff should submit or the court may require evidence in support of a new or amended pleading in order to satisfy the court that there are sufficient grounds to support a new cause of action if the present one is dismissed. *See id.* Finally, the court may "treat the motion as a motion for summary judgment" after adequate notice to the parties. CPLR 3211(c). This discretionary conversion can be utilized when the record on the motion to dismiss is "as complete as it would be on an outright motion for summary judgment . . . ." CPLR 3211, commentary at 48 (McKinney 1970). It should be